IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1025.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,
Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS

The narrow scope of the question for decision by the Supreme Court upon this appeal, as stated in appellants' main brief (Br. 17-18), is fully confirmed by the brief filed by the government. It is expressly conceded by the government that the Chain Broadcasting Regulations promulgated by the Commission's Order are reviewable under Section 402 of the Communications Act of 1934 (Br. 55, 39-40) and it addresses itself to the single point at issue, that is,

whether the proper procedure for such review is that provided by Section 402(a) of the Act, as contended by appellants, or that provided by Section 402(b), as contended by the government.

All of the salient facts showing that the Commission's Order is, on its face, an "order" promulgating regulations which is a proper subject for review under Section 402(a) are stated or conceded in the government's brief (Br. 5-7, 36, fn. 46, 43-44). The damaging effect of the Order is in no way denied, although the government seeks to dismiss it as an "incidental consequence" of the Order (Br. 41-44). The government goes so far as to concede that, save for an alleged lack of finality, the Commission's Order is an "order" within the meaning of Section 402(a) of the Act (Br. 48-49).

As pointed out in appellants' main brief (Br. 24), the government's sole argument in answer to the fact that the Order seems reviewable under Section 402(a) is based upon verbalism. The formalistic nature of the government's position is made clear by the following statement, to be found at p. 34 of its brief:

> "If the Commission had not phrased its regulation in terms of 'no license shall be granted' licensees with network affiliation contracts would have been forced immediately to alter their contracts or be subjected to criminal penalties."

The proposition that the decision in this case should depend upon the turn of a phrase is ridiculous on its face, and the government's argument conflicts at every stage with the operative facts.

Not only does every substantive characteristic of the Order show that it is reviewable under Section 402(a) of the Act but the Order has had the direct and immediate effect

of causing many radio stations to abrogate their network contracts without regard to the times when their respective licenses expired (R. 16, 405-419). In addition, during the effective period of the Order as to new contracts between May 2, 1941 and November 12, 1941, NBC was completely unable to enter into new affiliation contracts, although both parties were ready, able and willing to do so except for the Order (R. 16).

The significant facts showing that the Commission's Order promulgated definitive, enforceable regulations so as to be, in substance as well as in form, an order of the character reviewable under Section 402(a) of the Act rather than under Section 402(b), are outlined in Point II of appellants' main brief (Br. 25-38).*

The government is unable to deny these facts and it is remitted to the argument that such facts should be regarded as immaterial despite the fact that they caused the abrogation of network affiliation contracts and forestalled new ones. Its argument should be rejected because it does not afford a reasonable explanation for the action taken by the Commission, the statements made by it, or the conceded effect which such action and statements have had.

The government makes much of the fact that the Order contains an announcement of licensing policy, but no valid conclusion as to the procedure by which the Order should be reviewed can be based upon that fact. All of the Commission's regulations dealing with radio are expressive of its licensing policies under the Act and may be enforced by

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* The government inadvertently states (Br. 20) that NBC seeks to enjoin all eight regulations. The complaint clearly states that an injunction is sought only against those regulations which purport to have become effective on or before November 15, 1941 (R. 17). Since the effective date of regulation 3.107 was "suspended indefinitely" by the Order of the Commission of October 11, 1941, it is clear that NBC does not seek an injunction against that regulation.

denials of applications for license renewals. This is as true of the regulations enumerated at p. 35, fn. 45, of the government's brief as of the regulations enumerated in fn. 44 on the same page.

The true question for decision by this Court is whether the regulations should, under all the circumstances, be regarded as sufficiently definitive to justify their review under Section 402(a) rather than under Section 402(b). Both the facts and the authorities cited in the government's brief, as distinguished from the conclusions which the government seeks to draw from them, lead to the determination that it should.

Factors which demonstrate the definitive character of the Commission's Order (appellants' main brief, 25-30) are conceded by the government. It expressly concedes that the Commission's Order was preceded by an investigation of "wide scope and thoroughness" (Br. 36) to enable the Commission to be fully informed, that the regulations are "phrased precisely" (Br. 36, fn. 46), and that the Commission in promulgating the regulations relied, as a source of power, upon Section 303(i) of the Act which authorizes the Commission to make "special regulations applicable to radio stations engaged in chain broadcasting" (Br. 36, fn. 46).

The government's suggestion (Br. 36, fn. 46) that the precise phraseology of the regulations is meaningless because their application is subject to the general standard of "public interest, convenience or necessity" is astonishing both in view of the fact that the Commission is without power to promulgate any regulations unless it has determined that they accord with such standard and in the light of the findings regarding the public interest scattered throughout the Commission's Report (*e. g.*, R. 113, 115, 118, 121, 122) and referred to in the government's brief (Br. 17).

Appellants have no quarrel with the government's suggestion that it is desirable for administrative agencies to make announcements of general policy rather than to limit themselves to a case-by-case development of policy (Br. 29, 57). The Commission may well announce general policies by informal press releases, speeches of its members and, perhaps, even by formal orders and regulations. But the suggestion relates to an announcement of *general* policy. It assumes that the policy so announced will serve as a general guide and will leave the Commission free to make determinations in individual cases on the basis of evidence and argument presented in those cases, both as to the validity or reasonableness of the policy and to its relevance in the particular situations.

But here we are dealing not with a statement of general policy, but with a rule of thumb. It is not stated in the other regulations, as it is in regulation 3.106, that the Commission will scrutinize affiliation contracts to see whether they substantially restrain competition. On the contrary, it is specifically stated that an exclusive option contract will disqualify a broadcast station.

If the Commission had meant to leave its discretion in the matter in future cases, it might have merely published its Report in which its point of view was generally stated, or it might, in the regulations themselves, have stated general standards as it did in Section 3.106, or have otherwise indicated that it would consider cases individually and exercise discretion on the basis of some general standard. None of these things did the Commission do. And it did not do them, presumably, because it had definitely made up its mind once and for all, for this station and for that, that the particular type of affiliation contract described in the regulations must go.

With respect to the enforceability of the regulations, the statement is made by the government in the body of its brief

at page 33 that the regulations need not be complied with by licensees and are not enforceable in revocation proceedings. This statement is immediately withdrawn in a footnote appearing on the following page. In the hearings before the Senate Committee on Interstate Commerce and in its brief in the court below, the Commission conceded that revocation proceedings could be instituted under Section 312(a) of the Communications Act for non-compliance with the regulations (appellants' Br. 30-31). It now denies that revocation could be based upon that ground but concedes that it would be appropriate under another portion of Section 312(a) (Br. 34, fn. 43). The result is the same. The Commission's regulations are enforceable by revocation proceedings.

The government seeks to distinguish such cases as *American Telephone & Telegraph Company* v. *United States*, 299 U. S. 232 (1936), on the ground that in those cases the regulations had to be complied with and gave rise to penal sanctions for their violation or for violation of the statute (Br. 37, *et seq.*). The attempted distinction is unsound, for, as pointed out in appellants' main brief (Br. 30-36), the Commission's regulations must be complied with by licensees at the risk of the administrative sanction of revocation as well as the penal sanction provided by Section 502 of the Act.

Again, the primary characteristic of the government's argument is its reliance upon technical distinctions. It disregards the fact that the governing question is not the precise nature of the sanction that causes irreparable injury in a particular case, but whether under all the circumstances it is reasonable to conclude that irreparable injury is a natural consequence of the order under consideration.

Certainly, *Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125 (1939), and *Powell* v. *United*

States, 300 U. S. 276 (1937), discussed at page 37 of appellants' brief, indicate that this Court has treated this question with a real regard for the substantive core of the problem, which it has traced through widely varying fact situations.

Appellants do not contend for a moment that all regulations of the Commission should be reviewed under Section 402(a) any more than all congressional legislation should be reviewed by injunction against the enforcing officer. Of course, before an injunction can issue a plaintiff must show not merely that he is affected by the statute but also that he would suffer irreparable injury if he were remitted to remedy other than by injunction. In the case at bar, there has been no determination that an injunction would be inappropriate as a matter of equity jurisdiction. Indeed, the opinion of the court below indicates that a bill in equity for injunctive relief in a one-judge court would be appropriate.

The government relies heavily upon the "minute" adopted by the Commission following the institution of the present suit as justification for its contention that Section 402(b) rather than Section 402(a) is the proper procedure for review of the Order. It states that the Commission "particularized the procedure with respect to hearings involving questions under the Chain Broadcasting Regulations by its Minute" (Br. 25-26).

It can scarcely be contended, however, that such particularization should be accepted by this Court as an adequate substitute for the expressed intention of Congress that all orders of the Commission should be reviewed under Section 402(a) except only the five specific types reviewable under Section 402(b). There is nothing in the "minute" that operates to change the form or the substance of the Commission's Order as an order promulgating definitive,

enforceable regulations which, like all regulations, are subject to amendment and stays of their enforcement.

The government's failure to point out any substantive questions remaining for determination by the Commission in license renewal proceedings and its arguments touching the appropriateness of Section 402(b) as a method for reviewing the Order leave unanswered the question of why the remedy under Section 402(b) is advocated so insistently.

One suggestion made in the government's brief is that the Commission may in some cases waive the regulations and grant renewal applications, although the Commission concedes in its brief that the regulations will in all probability be applied according to their terms in the absence of special circumstances (Br. 28, 55, 60, fn. 66, *cf.* 54).

Although it is difficult to understand how regulations of such irregular application could "serve as a guide to applicants and other interested parties" (Br. 53), the net result of admitting such a possibility will be the conclusion that the chances of obtaining expeditious review of the Commission's power to make its Order under Section 402(b) are even less than was suggested in appellants' main brief (Br. 42-45).

Moreover, waivers or exceptions will be of no service to NBC, which requires the co-operation of substantially all of its affiliated stations in order to carry out its function of furnishing a nation-wide network broadcasting service. The government notes this claim (Br. 41) and it is significant that it does not attempt to deny that the operations of NBC will be disrupted as a consequence of the Order. Instead it solemnly suggests that any action in conformity with the regulations taken by NBC's affiliated stations which, prior to May 2, 1941, faithfully observed their contracts, would be taken by such stations "of their own choice" (Br. 42). It urges this Court to regard the resulting destruc-

tion of nation-wide network broadcasting services as an "incidental consequence" of the Order (Br. 43). A contention of this character ill-accords with the Commission's duty to foster the broadcasting services of this country in the "public interest, convenience or necessity" (see Sections 303, 307 and 309 of the Act) or with the general purposes of the Act (Section 1):

> "To make available, so far as possible, to all the people of the United States, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication * * *."

Another possibility suggested by the government to indicate the applicability of Section 402(b) is that the Commission may modify its regulations in subsequent licensing proceedings (Br. 55).* The power to modify is co-extensive with the power to regulate and if the possibility of amendment precluded court review, no order promulgating regulations would ever be subject to judicial review.

The suggestion that the Commission might hold a hearing with respect to the applicability of the regulations to a licensee which had conformed with the regulations in advance of application for renewal of its license (Br. 41-42) has no relation whatever to the appropriateness of Section 402(b) as a method of reviewing the regulations. In no event could such licensee be held to violate the regulations,

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* *Cf.* "Senator WHITE. I assume that if you have power to make these regulations you have the power to modify them and change them or to wipe them out in their entirety.

Mr. FLY. I do not so assume, sir, unless the modifications that we would make would be in accordance with the law, as these regulations are." *(Hearings before Committee on Interstate Commerce on S. Res. 113, 77th Cong., 1st Sess. (1941), p. 96).*

and this suggestion is the *reductio ad absurdum* of the government's argument that Section 402(b) is a readily available means for testing the legality of the Commission's Order. Consequently, the argument of convenience, if it is necessary to bolster the plain import of the statute that these regulations are reviewable under Section 402(a), is wholly on the side of appellants.

Finally, it should be pointed out that appellants are not seeking any advantage by review under Section 402(a). They are seeking here to avoid complete destruction of their business rather than to secure an unwarranted advantage in the selection of a case or a forum and they are not subject to criticism such as was leveled at the public utility holding companies with respect to the Holding Company Act.

As mentioned in the government's brief (Br. 45, fn. 50), after the District Court had rendered its opinion, appellants offered to the Commission, indeed requested the Commission, to select representative cases and proceed with them in licensing proceedings, provided only that enforcement of the regulations would be stayed for all cases. This the Commission declined to do despite the obvious fairness of the proposal.

On the whole record, it is impossible to escape the conclusion that the Commission is concerned with something more than a desire to have its Order reviewed in an orderly manner. The only explanation which fully accords with the facts is that the Commission wants the substantive advantage of definitive, enforceable regulations without the incidents of reviewability which normally are attached to such regulations.

It is submitted that the foregoing disposes of the points raised in the brief filed by the government. It also disposes

of Point I of the brief filed on behalf of the Intervenor, Mutual Broadcasting System, Inc. (MBS), which is in substance the prematurity argument made by the government although it is incorrectly phrased in terms of the doctrine of "primary jurisdiction".

Points II and III of the MBS brief are devoted to the proposition that no order which is legislative in character is properly subject to judicial review under the Urgent Deficiencies Act and that particularly no such order of the Federal Communications Commission is reviewable under Section 402(a) of the Communications Act of 1934. This argument is made at the expense of charging with error not only the appellants but also the majority and minority of the District Court, the Government and the Commission itself (MBS brief, p. 16).

Stripped of the verbiage with which it is adorned, this argument amounts to a plea that this Court rewrite the express language of Congress, contained in Section 402(a), that "any order of the Commission" is reviewable under Section 402(a) with the five specific exceptions described in Section 402(b), to conform to MBS' view of what Congress should have said, *i. e.*, "any order of the Commission except orders which are legislative in character" are reviewable under Section 402(a) with the same five exceptions. The fallacy of this position cannot be avoided by redefinition of the meaning of "legislative orders" as urged by MBS (Br. 19 *et seq.*) nor by the device of classifying all contrary decisions of this Court as "exceptions."

The bland statement in the MBS brief (p. 3) that its claims to the effect service to the public has been impaired and revenue decreased to many broadcasters "have never been seriously controverted" should not pass unchallenged lest an erroneous impression be conveyed. A large portion

of the case on the merits relates to the matters thus so unceremoniously disposed of in passing. The facts are that the Commission's Report shows an enormous growth in MBS' business (R. 28). MBS, in soliciting advertisers, boasts of its competitive advantages in numerous markets (R. 357-359) and the theory that the public service is impaired by the contract provisions banned by the regulations has always been most seriously challenged in hearings before the Commission prior to the promulgation of the original Order on May 2, 1941, upon the rehearing of the Order on September 12, 1941, and in the District Court.

Conclusion

It is respectfully submitted that the decision of the District Court should be reversed and the cause remanded to that Court for consideration of the merits.

Respectfully submitted,

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